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Supreme Court, U.S.
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No. 03-1577

In the

Supreme Court of the United States

JOSETTE DUMONT DECARLO,
Executrix of the Estate of Daniel S DeCarlo,

Petitioner,

vs.

ARCHIE COMIC PUBLICATIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

WHITNEY NORTH SEYMOUR, JR.
Attorney for Petitioner
425 Lexington Avenue, Room 1721
New York, New York 10017
(212) 455-7640

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In accordance with Supreme Court Rule 15(g), Petitioner respectfully submits this Reply Brief addressing new points raised in the Brief in Opposition.

1. WIDESPREAD CIRCUIT COURT APPROVAL OF LOCAL DISTRICT COURT RULE 56.1 AND ITS EQUIVALENTS BY SEVEN COURTS OF APPEAL, IN ADDITION TO THE SECOND CIRCUIT, UNDERSCORES THE IMPORTANCE OF THE QUESTION OF FEDERAL LAW RAISED BY THIS PETITION.

The Brief in Opposition states (at page 10) that Local Rule 56.1 of the Eastern and Southern Districts of New York has been approved, not only by the Second Circuit Court of Appeals, but also, in substance, by seven other Circuit Courts:

First Circuit
Fifth Circuit
Seventh Circuit
Eighth Circuit
Ninth Circuit
D.C. Circuit
Federal Circuit

This fact emphasizes the importance of the question of federal law raised by this Petition and a compelling reason why this Petition should be granted (see Supreme Court Rule 10(c)).

2. THE DISTRICT COURT'S "CASTIGATION" OF COUNSEL FOR FAILURE TO COMPLY WITH LOCAL RULE 56.1 SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The Brief in Opposition candidly states the District Court's decision "castigated" Petitioner for failing to comply with Local Rule 56.1 (at page 7). According to Respondent's Brief (at page 12):

> Petitioner asserts that Local Rule 56.1 is unduly burdensome because it requires the nonmovant to respond to assertions of fact that are not material. However, the rules of procedure provide a ready solution for cases in which the movant's statements includes immaterial facts: the nonmovant can file a motion to strike. *In the alternative, it can simply abstain from responding to the assertions of immaterial fact.*

(Emphasis added.)

If abstention were in fact an option, there would be no problem. However, that is not how the District Court interpreted and applied the Rule 56.1 when it castigated counsel in this case. The Judge held that "'[a] proper Rule 56.1 statement submitted by a non-movant should consist of a *paragraph-by-paragraph response* to the movant's 56.1 statement, much like an answer to a complaint' and must cite admissible evidence...." (A-5–A-6) (Emphasis added.) Petitioner's counsel's failure to respond to every paragraph in the movant's Rule 56.1 statement in a manner to satisfy the District Judge formed the basis for the following public criticisms of counsel in his published opinion:

"This response is utterly insufficient." (A-7)

* * *

"To the extent she denies the ability to admit or deny these assertions, her response also is insufficient because alleged inability to admit or deny is no excuse, at least in the absence of a sufficient Rule 56(f) affidavit, and none has been submitted here." (A-8)

* * *

"In any case, the Court has reviewed the record and finds that the facts set forth below are undisputed, which is not surprising in view of the fact that defendant has submitted in opposition to the motion only two brief declarations of percipient witnesses and one by her attorney." (A-8–A-9)

These harsh statements by a Federal Judge in a published opinion demonstrates not only the departure of one lower court from the accepted and usual course of proceedings under Rule 56 as interpreted by the U.S. Supreme Court, but they bode ill for the future conduct of all commercial litigation in United States courts.

No counsel wishes to have his or her client read such indictments of professional conduct in a published opinion — which obviously invite immediate termination of services or even a malpractice claim. As a result, it is predictable that in future cases, corporate and other deep-pocket defendants are guaranteed an absolute foolproof weapon for harassment of impecunious individual plaintiffs simply by filing sweeping encyclopedic Rule 56.1 statements on motions for summary judgment filled with immaterial facts which opposing small firms or sole practitioners cannot possibly respond to "paragraph-by-paragraph" with detailed

admissible evidence under a tight deadline in a manner that will satisfy District Court requirements under this local court rule. That is exactly what transpired here.

Litigation outcomes will now be governed by financial resources, rather than by the merits. Federal justice as practiced here assumes a wholly unacceptable bias for the wealthy that is contrary to every precept of "Equal Justice Under Law" — the words carved in stone above the portal to this honorable court.

3. RESPONDENT'S BRIEF PROVIDES A ROAD MAP TO THE DISTRICT COURT'S USURPATION OF THE JURY FUNCTION IN DECIDING DISPUTED ISSUES OF FACT.

At pages 15–25, Respondent's Brief in Opposition to the grant of certiorari spells out in some detail how the Petitioner was deprived of her constitutional rights to a jury trial.

This Court has stated in a single terse sentence in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1985) the rule governing when a case must go to the jury (at page 257):

> We repeat, however that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor.

In this case, that evidence consisted of three groups of deposition testimony and documentary evidence (See Petition at page 8):

A. ***JOSIE***. On the issue of who owns the *Josie* characters (concededly first created by DeCarlo), the key material issue of fact below was whether the newly discovered evidence in this case, resulting from ACP's production of four cancelled checks (never produced in the first *Josie* litigation, although demanded), refuted ACP's previous claim that it was unaware of DeCarlo's ownership of *Josie* and had been

misled by DeCarlo's silence [the result of DeCarlo's fear of termination]. Because of the significance of the cancelled checks in showing ACP's position at the time of its alleged reliance, the District Court should have reopened the case. Instead, the District Court pinned fault *on DeCarlo* for not producing the information triggered by the checks *that were in Archie's possession*, including DeCarlo's production of a handwritten copy of a single check endorsement. (A-9–A-10; A-15–A-17; A-23–A-26). This position is repeated in the Respondent's brief at (page 21):

> DeCarlo did not disclose the existence of the copy [the handwritten copy of the check legend] until his deposition in this, the second lawsuit. [Record - 302]. He was thus *solely responsible* for the fact that it was not before the court in *DeCarlo*.

(Emphasis added.)

The actual deposition testimony relied on by Respondent and the District Court was entirely the result of ACP's delayed production of the four cancelled checks and questioning of DeCarlo by ACP's counsel based on the wording of those checks. (JA 302).

Q. [By Ms. Herrmann] So you would sign underneath that text when you endorsed the check?

A. [By Mr. DeCarlo] Right.

MR. SEYMOUR: [To Ms. Herrmann] Can you produce all those checks?

MS. HERRMANN: We don't have those.

Q. [To Mr. DeCarlo] You don't have any of those checks?

A. No, but I think I have — when I went to see a lawyer, I think I wrote down the back of the check word for word, and I might have that copy at home.

Instead of holding that *ACP* itself caused the withholding of the check evidence in the earlier case, the District Court concluded that it was DeCarlo who was at fault.

Equitable estoppel was a major factual issue and under these circumstances the District Court should have reopened the factual basis for the equitable estoppel determination and permitted a trial jury to decide the question.

B. ***SABRINA***. The work-for-hire finding regarding the model sheet for *Sabrina* was another major factual dispute that should have been submitted to a jury. Respondent's Brief says (at page 17):

> However, even if viewed as a question of fact, there was no dispute to resolve. In light of DeCarlo's characterization of the model sheet as the "first-step" toward completing the story assignment for which he was paid a flat fee, no reasonable jury could conclude that the model sheet was a separate project that had to be separately paid for to satisfy the "expense" prong of the work-for-hire test.

That is exactly the factual question a jury should have decided. It must be remembered that there was no evidence below that any other artist ever created *new* characters for ACP [except for Joe Montana, who created Archie and Jughead some years prior to Dan DeCarlo's arrival]. Mr. DeCarlo was a unique talent. This is self-evident from the fact that it was DeCarlo who was chosen by ACP to create both the *Sabrina* and the *Cheryl Blossom* groups of characters. There is no factual support for the claim in Respondent's Brief (at page 8) that it was "customary" to pay a flat fee based on the length of the story to cover both the story illustrations *and* the creation of new characters used in that story. What was customary was to pay *all* artists working for Archie [a dozen or more] a flat per-page rate just for drawing comic book pages only, based on

stories supplied from writers. In this case, DeCarlo was paid $150 (or $160) for illustrating the first *Sabrina* story (5 pages at $30 (or $32) per page}. (DeCarlo dep., 12/7/00., at p.411). *No* reasonable jury would conclude that that sum was intended by the parties to cover the creation of a wholly new line of character prototypes that would later produce huge income for ACP from TV syndication and live-action motion pictures.

The "model sheet" step in the creation of character prototypes is significant because under copyright law this first creation "in fixed form" is what determines copyright ownership. (See Copyright Office Circular 44 set out on page 6 of Petition.) To help the Court understand the model sheet concept we attach hereto as Appendix D reduced copies of the *Sabrina* and *Cheryl Blossom* model sheets in suit [as redrawn by Mr. DeCarlo to replace the originals lost by ACP]. (JA-310, JA-311, JA-313–JA-315)

The fact question a jury must decide is whether the *Sabrina* model sheet and the creative work behind it was simply 'thrown in' as a work for hire covered by the flat page rate for illustrating the first *Sabrina* comic book story, or whether the model sheet remained the copyright-protected property of the artist, licensed to ACP for comic book use.

C. ***CHERYL BLOSSOM***. The factual question regarding the *Cheryl Blossom* characters is whether they were transferred to ACP under the 1988 or 1996 ACP form agreements. DeCarlo's consistent position is that these agreements transfer ownership only in comic book pages — derivative uses — and not in the original model sheets and characters to which copyright ownership attaches.

Respondent's Brief in Opposition (at page 23) asserts ownership of *Cheryl Blossom* under paragraph 2(b) of the 1988 Agreement, which reads in full text:

> (b) The Contractor hereby expressly waives all claim of right which it may have to any ownership interest in such Works and/or the ARCHIE property.

Respondent then asserts:

> There is no ambiguity in this provision.

The ambiguities are legion:

Ambiguity #1: "Such Works" refers back to the contract definition of "Works" which in every case are described in the 1988 Agreement as "comic strips and pages for its [ACP's] comic books". The agreement nowhere mentions "model sheets".

Ambiguity #2: "ARCHIE property" is not defined in the 1988 agreement. The District Court based its factual finding that the *Cheryl Blossom* characters were part of the Archie "universe" on specific comic book stories — not on the contract. (A-13–A-14, at fns 47, 48, 49, 50, 51; A-38, at fn 119).

Ambiguity #3: The 1988 agreement was expressly superseded the 1996 agreement (JA-91):

> 32. This [1996] Agreement represents the entire understanding of the parties and supersedes all previous representations, understanding or agreements, oral or written.

Plainly the meaning and effect of paragraph 2(b) of the 1988 agreement was a question for the jury to decide, since it determines the entire ownership of the *Cheryl Blossom* characters.

The secondary ground of an "assignment" of comic book pages under the 1996 agreement, argued by Respondent (at page 25) as the basis for awarding ownership of the *Cheryl Blossom* and *Sabrina* characters to ACP, likewise should have gone to the jury.

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August 4, 2004

Respectfully submitted,

WHITNEY NORTH SEYMOUR, JR.
Attorney for Petitioner
425 Lexington Avenue, Room 1721
New York, New York 10017
(212) 455-7640